IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. 590

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, a Corporation,

Petitioner,

vs.

AMELIA MULDOWNEY, as Special Administratrix, of the Estate of HARRY MULDOWNEY, Deceased,

Respondent.

PETITIONER'S REPLY BRIEF.

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TABLE OF CASES.

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PETITIONER'S REPLY BRIEF.

Respondent evades the specific points urged in Petitioner's brief. To avoid misconception respecting the errors which require certiorari, a short reply brief is necessary.

I.

Material and Controlling Facts Ignored.

In Respondent's brief, and in the opinion of the Circuit Court of Appeals, no mention is made of these controlling

facts (established by undisputed direct evidence): (a) that when the engine tender, traveling 2 to 3 miles per hour, was 8 to 12 feet from the refrigerator car, Muldowney, then standing on the tender footboard, gave the engineer a lantern signal which indicated that everything was in readiness to make the coupling, and that the tender should continue moving back for that purpose (R. ff. 132-137, pp. 96-100); and (b) that had a drawbar adjustment been necessary at that time Muldowney could have made it without leaving the footboard, merely by shifting the oiled and easily moved tender drawbar (R. ff. 246, p. 180; f. 250, p. 183; ff. 253, 254, p. 186).

A jury finding that, after he gave the signal, Muldowney discovered a drawbar misalignment and placed himself in the path of the tender moving pursuant to *his* specific signal to effect alignment by attempting to move the 300-pound car drawbar, is inconsistent with these proven circumstances, contrary to the presumption of due care, and is based on mere speculation.

II.

Burden On Respondent to Establish Violation of Safety Appliance Act as Proximate Cause of Death.

The applicable and controlling decisions of this Court hold (1) that whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved by direct evidence and not themselves presumed, (2) that a verdict may not be based on inferences from inferences, presumptions resting on other presumptions, or mere speculation and conjecture, and (3) that where the inferences properly to be drawn from the proven facts or circumstances are

more consistent, or equally consistent, with non-liability than with liability, the proof tends to establish neither, and judgment as a matter of law must go against the party upon whom rests the burden of proving liability. *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663, 664; *Chicago, M. & St. P. RR. v. Coogan*, 271 U. S. 472, 477, 478; and *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 341-344. Respondent attempts to escape the force of these controlling rules by advancing the contention, that because here negligence is based on a violation of the Safety Appliance Act, the evidence necessary to discharge the burden of proof need not meet the test that is applicable when common law negligence only is relied on to establish liability (Respondent's brief, pp. 12, 13). Respondent's contention must be rejected.

A Safety Appliance Act violation is merely one species of carrier negligence under the Federal Employers' Liability Act. *San Antonio Ry. v. Wagner*, 241 U. S. 476, 484. Consequently the violation as a proximate cause of death must be established beyond speculation and conjecture by evidence which is substantial (*Chicago, M. & St. P. RR. Co. v. Coogan*, 271 U. S. 472; *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333).

III.

Circuit Court of Appeals Disregards This Court's Controlling Decisions.

The Circuit Court of Appeals consistently has declined to follow *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, *Chicago, M. & St. P. RR. Co. v. Coogan*, 271 U. S. 472, and

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, and has adopted its own views with respect to the degree of proof required to establish liability under the Federal Employers' Liability Act. *Chicago, St. Paul, Mpls. & Omaha R. Co. v. Kulp,* 88 Fed. (2d) 466, 102 Fed. (2d) 252; *Burke v. Lowden,* 129 Fed. (2d) 767; *Chicago, St. Paul, Mpls. & Omaha Ry. Co. v. Muldowney,* 130 Fed. (2d) 971 (decision in case at bar). In each case the Circuit Court of Appeals affirmed a judgment for plaintiff entered on a jury verdict which was based on inferences from inferences, presumptions resting on other presumptions, and speculation and conjecture, and where the proof was more consistent or equally consistent with non-liability.

So long as this Court declines to review these and similar decisions, (a) litigants in the Eighth Circuit will be deprived of a fair trial of actions under the Federal Employers' Liability Act; (b) the decisions of this Court in the Patton, Coogan and Chamberlain cases will be disregarded; and (c) the decisions of the Circuit Court of Appeals for the Eighth Circuit will be in conflict with the applicable law as laid down by this Court.

In support of the holding on proximate cause, the Circuit Court of Appeals cited *Geraghty v. Lehigh Valley R. Co.,* 70 Fed. (2d) 300. Neither that court nor respondent in her brief refers to the fact that the final decision in the Geraghty case (83 Fed. (2d) 738), reversed the trial court on the ground that the cause of action was not governed by the provisions of the Federal Employers' Liability Act, and that the State Compensation Act controlled.

In view of the disinclination of the Circuit Court of Appeals for the Eighth Circuit to follow and apply the doctrine of the Patton, Coogan and Chamberlain decisions, this Court, for the protection of litigants and the guidance

of that Court, should review by certiorari the judgment in the case at bar.

Respectfully submitted,

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